IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Gokul Ram & Ors. v. Bhanwarlal & Ors.

(1)S.B.CIVIL WRIT PETITION NO.1140/2004

Gokul Ram & Ors. v. Bhanwarlal & Ors.

(2)S.B.CIVIL WRIT PETITION NO.1285/2004

Petitions under Articles 226 and 227 of the Constitution of India.

Date of Order : 7th December, 2005

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. R.R.Nagauri, for the petitioners.
Mr. J.R.Patel, for the respondents.

BY THE COURT :

(1)SBCWP No.1140/2004

The non petitioner plaintiff filed a suit seeking permanent injunction with the allegations that there was a “BADA” situated at village Bhetunda in abadi area since time of his ancestors having a boundary with 26 feet wide way on western and southern sides, the petitioners defendants closed down said way which required to be opened by issuance of a mandatory injunction. An application under Order 39 Rule 1 and 2 read with Section 151 CPC was also filed alongwith the suit.

A reply to the application for temporary injunction was filed by the petitioners and during the proceedings a Commissioner was appointed who submitted an inspection report on 26.1.2002, which was placed on record.

The trial court by order dated 27.3.2002 accepted the application under Order 39 Rule 1 and 2 read with Section 151 CPC with a direction to open the way as per plaint averments. An appeal preferred against the order dated 27.3.2002 also came to be rejected by learned Additional District Judge No.2, Jodhpur vide the judgment dated 10.7.2002. The petitioners gave challenge to the order passed by the trial court and also the order passed by the appellate court by way of filing a revision petition before this Court which came to be dismissed by order dated 7.10.2003 being not maintainable.

After dismissal of revision petition the petitioners preferred present writ petition giving challenge to the order dated 7.10.2003 passed by learned Additional District Judge No.2, Jodhpur and the order dated 27.3.2002 passed by Civil Judge (JD), Jodhpur.

While giving challenge to the orders above it is contended by counsel for the petitioners that

learned trial court erred while granting a mandatory order in an application seeking temporary injunction without considering the material available on record and the law applicable to the case. According to counsel for the petitioners a mandatory order for bringing new state of affairs cannot be granted while deciding an application for temporary injunction. The order granting of way right into and within the land of the petitioners is without any reason or justification.

Heard counsel for the parties and perused the record.

The trial court by order dated 27.3.2002 while accepting the application preferred under Order 39 Rule 1 and 2 read with Section 151 CPC ordered for opening the way in accordance with the map annexed to the application. While granting such order the court reached at the conclusion that there is a prima facie case in favour of the petitioner and in the event the interim order as granted be not given, the same shall cause irreparable injury to the plaintiff applicant. The court also found balance of convenience in favour of granting the interim order. The court relied upon the report submitted by the Commissioner which in quite unambiguous terms mentions that the way was closed by fresh branches of Babool Tree. The relevant portion of the Commissioner report reads as under:-

> "उस बाडे में वादी की पांच छः गाये खडी थी. वादी के बाडे में जाने का रास्ता व गेट जो वादी ने बताया, वो रास्ता ताजे बबूल के द्वारा बन्द कर दिया गया. रास्ते पर बबूल के ताजे पेड़ कांट कर डाले हुए थे. जिसकी उंचाई लगभग पांच छः फीट थी."

The appellate court also found that the way ordered to be opened is the only way available and, therefore, if the interim order as granted by the trial court shall not be allowed to continue then the same will cause irreparable injury to the plaintiff non petitioner. The appellate court accordingly rejected the appeal.

The main contention of counsel for the petitioners is that the court granted a mandatory injunction in interlocutory proceedings and no such order could be granted while exercising powers under Order 39 Rule 1 and 2 CPC.

I do not find any force in the contention so raised. The court has granted the order on being satisfied that the injury is likely to be caused to the plaintiff as the way alleged to be closed is the only suitable way available. The court below passed the order exercising inherent powers vested with it. The effect of the order granted can be undone in the event of acceptance of suit, but in the event of denial for way the injury caused cannot be compensated

or satisfied at subsequent stage. The order passed by the trial court is based on the report given by the Commissioner, a perusal of which clearly shows that the existing way was closed by putting Babool branches. A right to use way is required to be protected and I am of considered opinion that no error is committed by the trial court by accepting the application for temporary injunction by order dated 27.3.2002. The order passed by the appellate authority also not suffers from any error. Accordingly no interference is warranted under Article 227 of the Constitution of India.

(2) SBCWPNo.1285/2004

This petition for writ is preferred by the defendant petitioners giving challenge to the order dated 20.5.2003 passed by the trial court and the order dated 7.9.2002 passed by the appellate court rejecting the application preferred under Order 39 Rule 4 CPC for setting aside the order dated 27.3.2002 passed by learned Civil Judge (JD), Jodhpur whereby a direction was given to open the way as mentioned in the map annexed to the application.

The courts below while rejecting the application under Order 39 Rule 4 CPC do not find that the plaintiff applicant made a false statements in relation to a material particular and also not found

any reason sufficient to set aside the temporary injunction granted. The court below after considering all the objections refused to vary, discharge or set aside the order dated 27.3.2002.

The order dated 27.3.2002 has already been affirmed by this Court by the same order in SBCWP No.1140/04, as such I do not find any reason to interfere with the orders impugned in present writ petition.

The writ petitions, therefore, deserves to be dismissed. Accordingly the same are dismissed.

No order as to costs.

(GOVIND MATHUR),J.

kkm/ps.